SUPREME COURT, U. S.

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No. 75-637

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

CAL G. TAYLOR AND THELMA H. TAYLOR, HIS WIFE; PHILLIP TAYLOR; DELORIS RAY; DONALD C. TAYLOR AND LADON'S PARKETTES CORPORATION, *Petitioners*

v.

R & A CONSTRUCTION, INC., *Respondent*
LETTIE LAFAUN TAYLOR, *Respondent*

PETITION FOR WRIT OF CERTIORARI ADDRESSED TO THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI ADDRESSED TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL STATEMENT

The Washington State Court of Appeals, Division I, in cause No. 2148-I, filed its opinion on January 13, 1975, affirming the trial court's Judgment dated the 29th day of January, 1973. A copy of said opinion appears in the Appendix of this petition.

Petition for Rehearing was properly and duly filed and the Order Denying Petition for Rehearing was filed on the 14th day of May, 1975, by the Chief Judge of the Court of Appeals, Division I.

Petition for Review directed to the Supreme Court of the State of Washington was duly and properly filed

and review was denied on June 24, 1975, with judgment becoming final on the 31st day of July, 1975, at which time it was remitted to the Superior Court of King County, Washington, after having become the final judgment of the Court of Appeals in the above-entitled case on July 31, 1975.

The jurisdiction of this Court to entertain the petition for certiorari is based upon Title 28 U.S.C. Section 1257.

QUESTIONS PRESENTED FOR REVIEW

The petitioner, LaDon's Parkettes, along with the other named petitioners, was a named defendant in an action to quiet title to certain real estate brought by the respondent, R & A Construction, Inc., in King County, Washington. The petitioners filed and served an answer and counterclaim alleging that the realty was owned in fee title by the petitioner, denied the pertinent allegations of respondent's complaint and prayed for a decree quieting title in LaDon's Parkettes and money damages against the respondent. A cross-claim was also made by the petitioner, LaDon's Parkettes, against one of the defendants, Lettie LaFaun Taylor, a former officer of the petitioner cooperative association, alleging a secret and malicious breach of her fiduciary duties to the association which was a duly organized cooperative association under the corporation statutes of the State of Washington.

Trial was held upon the issue of title in the Superior Court of King County, and Findings of Fact and Conclusions of Law and Judgment were entered awarding judgment in the sum of $13,500.00 to the petitioner as against the defendant, Lettie LaFaun Taylor, and a judgment quieting title to the realty in favor of the respondent, R & A Construction, Inc. The petitioner appealed the judgment of the King County Superior

Court to the Washington State Court of Appeals, Division I.

Following submission of briefs and oral argument, the Court of Appeals, Division I, filed an unpublished opinion affirming the decision of the trial court. Petitioner, LaDon's Parkettes, duly and properly filed a petition for rehearing which was subsequently denied by the Court of Appeals, Division I, after requiring the respondent to answer the petition. Petitioner then filed a petition for review with the Supreme Court of the State of Washington, which petition was denied upon the petition without hearing, and the judgment was then finalized by the Court of Appeals.

Since its inception in 1889, The Constitution of the State of Washington has carried a provision in Article 4, § 4, granting to the Supreme Court of the State of Washington "appellate jurisdiction in all actions and proceedings". This grant of jurisdiction along with others found in Article 4, § 4, of the Constitution of the State of Washington, has traditionally provided the basis for direct appeals from the Superior Courts of the State of Washington to the Supreme Court in all actions not specifically excepted by the Article.

The Supreme Court of the State of Washington has ruled that the provisions of Article 4, § 4, of the Constitution of the State of Washington are not "self executing" in the absence of statute. *State ex. rel. Northwestern Elec. Co. vs. Superior Court* (1947) 27 Wn 2d 694, 179 P2d 510; *Western American Co. v. St. Ann Co.* (1900) 22 Wn 158, 60 P 158. Accordingly, the legislature of the State of Washington enacted RCW 2.04.010 which contains substantially the same wording as that provision in the State Constitution.

In November, 1968, the voters of the State of

Washington passed Amendment 50 to the State Constitution which was incorporated as Article 4, § 30. This section contained six subsections, and the basic purpose of the amendment was to establish the Court of Appeals as a constitutional court along with the Supreme Court, Superior Court and Justice Courts. Washington State Constitution, Article 4, § 1. Among other provisions, subsection (2) provided for jurisdiction to be provided by statute or rule authorized by statute. Subsection (3) provided that superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute.

Following the adoption of Amendment 50, the legislature enacted RCW Chapter 2.06 which, among other things, established a court of appeals (RCW 2.06.010) and the number of geographical divisions and districts along with the number of judges thereof (RCW 2.06.020). More to the point of this petition, the section contained two statutes, RCW 2.06.030 and RCW 2.06.040, which the petitioners contend have worked to deny the petitioners due process under Article 1, §3, of the Washington State Constitution and the United States Constitution, Amendment XIV, § 1, and to deny the petitioners the equal protection of the laws of the State of Washington found in the United States Constitution, Amendment XIV, § 1, and Article 1, § 12 of the Washington State Constitution.

Petitioners contend that under the Constitution of the State of Washington, Article 4, § 4, and RCW 2.04.010 that they had a right of appeal to the Washington State Supreme Court, a right that was denied them when their petition for review from the decision of the Court of Appeals, Division I, was not granted by the Washington Supreme Court and the subsequent finalization of its judgment by the Court of Appeals,

Division I. It is part of this contention that this denial was based upon the provisions of RCW 2.06.030 which statute petitioners contend purports wrongfully to vest the *exclusive* jurisdiction of appeals from the Superior Courts of the State of Washington in the Court of Appeals. That such a denial constitutes a violation of the petitioners' right of due process under the constitutions of both the United States and the State of Washington and that accordingly, the petitioner, LaDon's Parkettes Corporation has been deprived of property without due process of law.

Further, the petitioners contend that RCW 2.06.-030 along with RCW 2.06.040 serve also to prevent the petitioners from receiving equal protection of the laws of the State of Washington under both Article 1, § 12, of the Constitution of the State of Washington and the United States Constitution, Amendment XIV, § 1. Under Article 4, § 21, of the Constitution of the State of Washington, the legislature is required to provide for the speedy publication of opinions of the supreme court with all opinions free for publication by any person. With the enactment of RCW 2.06.030, the legislature has attempted to vest exclusive jurisdiction, without sufficient constitutional authority, of the vast bulk of the cases appealed in the State of Washington in the Court of Appeals. By enacting RCW 2.06.040, the legislature has empowered the Court of Appeals to decide which cases have or have not "precedential value" and to publish only those which it deems to possess that "value". The Court of Appeals in the case of *State v. Fitzpatrick*, 5 Wn. App. 661, 491 P2d 262, has in turn decided that such unpublished cases do not become a part of the common law of the state and will not be considered if cited to a trial or appellate court. Thus, in the instant case and many others, litigants on appeal in the State of Washington find themselves in the disad-

vantaged position of their cause being the subject of an unpublished opinion not a part of the common law, a cause or decision, *sui generis*, so to speak with no effect or meaning to anyone outside the circle of litigants. This, petitioners contend, has placed them and any others suffering a similar disability in a position where their cause has been set aside and insulated from the main body of thelaw of the State of Washington with no automatic right of redress to the Supreme Court of the State of Washington because of RCW 2.06.030 which purports to vest exclusive jurisdiction of such appeals in the Court of Appeals.

That as a result of the denial of petitioners' petition for review before the Supreme Court of the State of Washington, and the subsequent finalization of the judgment of the Court of Appeals in and by that court, the petitioner, LaDon's Parkettes Corporation, has been deprived of property without due process of law in derogation of its constitutional rights under both the state and federal constitutions, and in addition thereto, has been denied the constitutional right of equal protection of the laws of that state.

That, as a result of the enactment and operation of RCW 2.06.030 and RCW 2.06.040 and the actions of the appellate courts of the State of Washington as a result of that legislation, the petitioners have been wrongfully deprived of valuable constitutional rights in the case at bar and many similarly situated litigants in the courts of the State of Washington in other causes are and shall be deprived of the rights guaranteed them by the Constitution of the United States and the laws and Constitution of the State of Washington. The possible far reaching effects thus resulting require that the issues presented by this petition be examined by the Supreme Court of the United States to whom this petition is addressed.

CONSTITUTIONAL PROVISIONS AND THE STATUTES

I. Constitutional Provisions

Constitution of the United States, Amendment XIV:

"§ 1. Citizenship rights not to be abridged by states Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of Washington, Article 1:

"§ 3. Personal Rights. No person shall be deprived of life, liberty, or property, without due process of law."

Constitution of the State of Washington, Article 1:

"§ 12. Special privileges and Immunities Prohibited. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

Constitution of the State of Washington, Article 4:

"§ 1. Judicial Power, Where Vested. The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide."

Constitution of the State of Washington, Article 4:

"§ 4. Jurisdiction. The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and ap-

pellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state of any judge thereof."

Constitution of the State of Washington, Article 4:

"§ 21. Publication of Opinions. The legislature shall provide for the speedy publication of opinions of the supreme court, and all opinions shall be free for publication by any person."

Constitution of the State of Washington, Amendment 50, Article4, § 30. Court of Appeals:

"(1) Authorization. In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute.

(2) Jurisdiction. The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute.

(3) Review of superior court. Superior court actions

may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute.

(4) Judges. The number, manner of election, compensation, terms of office, removal and retirement of judges of the court of appeals shall be as provided by statute.

(5) Administration and procedure. The administration and procedures of the court of appeals shall be as provided by rules issued by the supreme court.

(6) Conflicts. The provisions of this section shall supersede any conflicting provisions in prior sections of this article."

II. Statutes

"Revised Code of Washington 2.04.010 Jurisdiction. The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or before

the supreme court, or before any superior court of the state, or any judge thereof."

"Revised Code of Washington 2.06.010 Court of appeals established — Definitions

There is hereby established a court of appeals as a court of record. For the purpose of RCW 2.06.010 through 2.06.100 the following terms shall have the following meanings:

(1) "Rules" means rule of the supreme court.

(2) "Chief justice" means chief justice of the supreme court.

(3) "Court" means court of appeals.

(4) "Judge" means judge of the court of appeals.

(5) "Division" means a division of the court of appeals.

(6) "District" means a geographic subdivision of a division from which judges of the court of appeals are elected.

(7) "General election" means the biennial election at which members of the house of representatives are elected."

"Revised Code of Washington 2.06.020 Divisions — Locations — Judges enumerated — Districts

The court shall have three divisions, one of which shall be headquartered in Seattle, one of which shall be headquartered in Spokane, and one of which shall be headquartered in Tacoma:

(1) The first division shall have six judges from three districts, as follows:

(a) District 1 shall consist of King County and shall have four judges;

(b) District 2 shall consist of Snohomish county and shall have one judge; and

(c) District 3 shall consist of Island, San Juan, Skagit and Whatcom counties and shall have one judge.

(2) The second division shall have three judges, one from each of the following districts:

(a) District 1 shall consist of Pierce county.

(b) District 2 shall consist of Clallam, Grays Harbor, Jefferson, Kitsap, Mason and Thurston counties.

(c) District 3 shall consist of Clark, Cowlitz, Lewis, Pacific, Skamania and Wahkiakum counties.

(3) The third division shall have three judges, one from each of the following districts:

(a) District 1 shall consist of Ferry, Lincoln, Okanogan, Pend Oreille, Spokane and Stevens counties.

(b) District 2 shall consist of Adams, Asotin, Benton, Columbia, Franklin, Garfield, Grant, Walla Walla and Whitman counties.

(c) District 3 shall consist of Chelan, Douglas, Kittitas, Klickitat and Yakima counties."

"Revised Code of Washington 2.06.030 General power and authority — Transfers of cases — Appellate jurisdiction, exceptions — Appeals

The administration and procedures of the court shall be as provided by rules of the supreme court. The court shall be vested with all power and authority, not inconsistent with said rules, necessary to carry into complete execution all of its judgments, decrees and determinations in all matters within its

jurisdiction, according to the rules and principles of the common law and the Constitution and laws of this state.

For the prompt and orderly administration of justice, the supreme court may (1) transfer to the appropriate division of the court for decision a case or appeal pending before the supreme court; or (2) transfer to the supreme court for decision a case or appeal pending in a division of the court.

Subject to the provisions of this section, the court shall have exclusive appellate jurisdiction in all cases except:

(a) cases of quo warranto, prohibition, injunction or mandamus directed to state officials;

(b) criminal cases where the death penalty has been decreed;

(c) cases where the validity of all or any portion of a statute, ordinance, tax, impost, assessment or toll is drawn into question on the grounds of repugnancy to the Constitution of the United States or of the state of Washington, or to a statute or treaty of the United States, and the superior court has held against its validity;

(d) cases involving fundamental and urgent issues of broad public import requiring prompt and ultimate determination; and

(e) cases involving substantive issues on which there is a direct conflict among prevailing decisions of panels of the court or between decisions of the supreme court;

all of which shall be appealed directly to the supreme court: *Provided*, That whenever a majority of the court before which an appeal is pending, but before a

hearing thereon, is in doubt as to whether such appeal is within the categories set forth in subsection (d) or (e) of this section, the cause shall be certified to the supreme court for such determination.

When the court acquires jurisdiction of any cause and makes a disposition thereof, there shall be a right of appeal to the supreme court when the court reverses a judgment or order of the superior court by less than a unanimous decision. In all other cases, appeals from the court to the supreme court shall be only at the discretion of the supreme court upon the filing of a petition for review. No case, appeal or petition for a writ filed in the supreme court or the court shall be dismissed for the reason that it was not filed in the proper court, but it shall be transferred to the proper court."

"Revised Code of Washington 2.06.040 Panels — Decisions, publication as opinions, when — Sessions, where held — Rules

The court shall sit in panels of three judges and decisions shall be rendered by not less than a majority of the panel. In the determination of causes all decisions of the court shall be given in writing and the grounds of the decision shall be stated. All decisions of the court having precedential value shall be published as opinions of the court. Each panel shall determine whether a decision of the court has sufficient precedential value to be published as an opinion of the court. Decisions determined not to have precedential value shall not be published. Panels in the first division shall be comprised of such judges as the chief judge thereof shall from time to time direct. Judges of the respective divisions may sit in other divisions and causes may be transferred between divisions, as directed by written order of the chief

justice. The court may hold sessions in such of the following cities as may be designated by rule: Seattle, Everett, Bellingham, Tacoma, Vancouver, Spokane, Yakima, Richland and Walla Walla

No judge of the court shall be entitled to per diem or mileage for services performed at either his legal residence or the headquarters of the division of the court of which he is a member.

The court may establish rules supplementary to and not to conflict with rules of the supreme court."

"Revised Code of Washington 6.28.050 Approval of court necessary. A conveyance by a commissioner shall not pass any right until it has been examined and approved by the court, which approval shall be indorsed on the conveyance and recorded with it."

STATEMENT OF THE CASE

The petitioner, LaDon's Parkettes Corporation, owned a valuable parcel of land consisting of nine and one-half (9½) acres near Renton in King County, Washington. With the exception of Cal G. Taylor, all of the petitioners and the respondent, Lettie LaFaun Taylor, were shareholders and/or officers in the cooperative association formed under the corporation laws of the State of Washington (St. 62; Tr. 25, 26; Ex. 15, 19).

Following a divorce from the president of the cooperative, the respondent, Lettie LaFaun Taylor, obtained fee title to a small parcel (Tr. 27 and 28) with a residence house which adjoined and was contiguous with the cooperative's realty and which had once been a part of the same parcel prior to conveyance of the

nine and one-half (9½) acres at a prior time to the cooperative association. At the time of the divorce, her former parents-in-law, Cal G. and Thelma Taylor, residents of Arizona, were the holders of a modest real estate mortgage covering both parcels, and claimed debts owing to them by Lettie LaFaun Taylor, her former husband. Donald C. Taylor, and the cooperative association for money advanced on loans (St. 62; Tr. 26). The elder Taylors brought action in King County to foreclose the mortgage and a separate action based upon the other loan of indebtedness (Tr. 27). In the second action a writ of attachment was issued which covered the nine and one-half (9½) acre parcel as well as the parcel belonging to Lettie LaFaun Taylor.

Early in the following year, 1968, Lettie LaFaun Taylor commenced an action in King County, Washington, directed against the cooperative association for which she had previously appeared, along with her attorney to represent her in the actions commenced by the elder Taylors, which actions were still pending. By a fraudulent and perjured affidavit filed with the King County Superior Court, she received permission to serve summons and complaint by publication and by this means obtained an order of default against the cooperative association, and pursuant to RCW Chapter 6.28, a judgment was entered which ordered the appointment of a commissioner of deeds and the execution by him of a commissioner's deed of conveyance to Lettie LaFaun Taylor (St. 63, 64; Supp. St. 1, 2; Tr. 28; Supp. Tr. 3). A deed was prepared by the commissioner who failed to secure written approval of the King County Court on the face of the deed as mandatorily required by R.C.W. 6.28.050 (St. 64; Supp. St. 2; Tr. 29; Ex. 16). The fatally defective deed was recorded with the King County Auditor's office and on June 18,

1968, Lettie LaFaun Taylor conveyed the entire realty, including the nine and one-half (9½) acres belonging to the petitioner, to the respondent, R & A Construction, Inc. (St. 7, 8, 13; Supp. St. 3; Tr. 29; Ex. 1). A portion of the funds received by her were used to pay the mortgage indebtedness and other claims of the elder Taylors that encumbered the property. Almost immediately after receipt of the deed from Lettie LaFaun Taylor, the respondent, R & A Construction, Inc., commenced proceedings to replat the premises to a residential area and construction was commenced on thirty-four residential structures destined to rise on the realty.

Later in the year, the petitioners discovered the existence of the fraudulent action commenced by Lettie LaFaun Taylor in the King County Superior Court, and on November 27, 1968, a motion was filed on behalf of the cooperative petitioner in the King County Superior Court in that action asking that the judgment in that cause be set aside and that the defendant, LaDon's Parkettes, Inc., be permitted to file and serve an answer (Supp. Tr. 8-12). On the 28th day of January, 1969, the court granted the defendants' motion, and the cause came to issue with the answer (Supp. St. 3; Supp. Tr. 6). Trial was held on December 11, 1969, and the Superior Court of King County dismissed the complaint of Lettie LaFaun Taylor, ruling that the nine and one-half (9½) acres belonged to the petition, LaDon's Parkettes Corporation (Supp. Tr. 1). That judgment was appealed and later affirmed on October 18, 1971.

In January, 1971, the respondent, R & A Construction, Inc., commenced the instant action before the King County Superior Court praying that title to the subject property be vested in that plaintiff (Tr. 144). By reply, later incorporated by the trial court as part of the allegations in the complaint, the plaintiff asked

alternatively for the value of improvements under the betterments statute of the State of Washington, RCW Chapter 7.28 *et seq.* (Tr. 116-125). The petitioners appeared, answered [redacted] counterclaimed alleging title in the petitioner cooperative and asked that title be quieted in LaDon's Parkettes Corporation. The counterclaim against the respondent, R & A Construction, Inc., also prayed for damages for the wrongful possession of the realty (Tr. 134). A cross-claim was lodged against Lettie LaFaun Taylor alleging damages as a result of her deliberate malfeasance as corporate officer (Tr. 138-139).

Trial of the instant case was then commenced on May 16, 1972, before the Superior Court of King County, Washington, Honorable Theodore S. Turner, presiding. The issue of title in and to the property was first tried by consent of the parties, with the deferment of the issue of betterments should the court grant title to LaDon's Parkettes Corporation. Following the submission of evidence and a number of briefs and oral arguments, the court found in favor of the respondent, R & A Construction, Inc., as against the petitioner. The court went on to award a money judgment in favor of the petitioner, IaDon's Parkettes Corporation, against the respondent, Lettie LaFaun Taylor, for her malfeasance, and dismissed all claims against the other petitioners, who as mentioned were named as defendants in the action below (Tr. 15).

Following denial of a motion for a new trial by letter from the trial court (Tr. 12), the petitioners appealed the judgment of the trial court to Division I of the Washington State Court of Appeals. Following submission of briefs and oral arguments, the Court of Appeals, on January 13, 1975, filed its unpublished opinion affirming the ruling of the trial court. Petition

for rehearing was made to the Court of Appeals, Division I, and by order of the Chief Judge entered on February 24, 1975, the respondent, R & A Construction, Inc.. was required to respond to the petition. The Respondent's Answer to Appellants' Petition for Rehearing was filed on March 11, 1975, and petition for rehearing was subsequently denied on May 14, 1975.

The opinion of the Court of Appeals, Division I, was issued as an unpublished opinion pursuant to RCW 2.06.040.

Within the appropriate time period permitted, the petitioners filed a petition for review which was denied without appearance or oral argument before the Supreme Court, and the judgment of the Court of Appeals was subsequently finalized by the Court of Appeals.

ARGUMENT

Under the Washington State Constitution, Article 4, § 4, as well as under RCW 2.04.010, appellate jurisdiction in all actions and proceedings except civil actions for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars.

The adding of Amendment 50, Article 4, § 30, to the Washington State Constitution did not deprive the Washington State Supreme Court of its complete appellate jurisdiction, but merely authorized the creation of a court of appeals and by subsection (2) provided that the jurisdiction of the court of appeals be provided by statute or rules authorized by statute. Subsection (3) of this amendment also does not serve to deprive the supreme court of its appellate jurisdiction, since it merely provides that superior court actions may be re-

viewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute. The latter subdivision does not conflict with the grant of jurisdiction found in Article 4, § 4, of the Washington State Constitution and thereby serve to deprive the Washington State Supreme Court of that power, but merely serves to provide another appeal forum and the legislative means by which actions from superior court may be provided for in either forum. Again, this does not conflict with Article 4, § 4, of the Washington State Constitution, but is consistent with the provisions thereof and thus not subject to supercession through subsection 6 of Article 4, § 30, (Amendment 50).

In the obviously mistaken belief that Amendment 50, Article 4, § 30, of the Washington State Constitution had superceded Article 4, § 4, of the Washington State Constitution, in the matter of appellate jurisdiction, the legislature through the enactment of RCW 2.06.030 attempted to vest exclusive appellate jurisdiction in the Court of Appeals with the exception of those specified cases mentioned in the statute. Based upon this attempted grant of exclusive jurisdiction, the legislature then permitted appeals to the supreme court only at the discretion of the supreme court upon the filing of a petition for review. The petitioner contends that appeal to the Washington State Supreme Court is a matter of right under the constitution and laws of the State and that a denial of that right is a denial of due process.

The Supreme Court of the State of Washington has long recognized that Article 4, § 4, of the Washington State Constitution grants a right of appeal. *Bishop v. Illman*, 9 Wn 2d 360, 115 P2d 151; *Robison v LaForge*, 170, Wn 678, 17 P2d 843. Though the right exists, it is not self executing but must be given vitality

by statute or rule of the supreme court. *State ex rel. Northwestern Elec. Co. v. Superior Court for Clark County, supra; Robison v. LaForge, supra; Western American Co. v. St. Ann Co., supra.*

RCW 2.06.030 is repugnant to the Constitution of the State of Washington in that it provides for the "exclusive" appellate jurisdiction of the Court of Appeals in the face of a specific constitututional grant of that jurisdiction to the supreme court by Article 4, § 4, of the Washington State Constitution and without being given the power to subtract from the appellate jurisdiction Amendment 50, Article 4, § 30, of the Washington State Constitution or any other constitutional provision. Thus, the statute must fail as a result of its unconstitutional nature to either establish the jurisdiction of the court of appeals, or to prescribe the circumstances in which appeals may be taken to either the court of appeals or the supreme court. This being the case, petitioners exercise of the right of appeal may only be made to the Washington State Supreme Court, and the petitioners were denied that right when their petition for review was denied by the Washington State Supreme Court and the judgment of the Court of Appeals, Division I, finalized.

Further, the petitioners were denied due process and equal protection of the law where they were not only denied an appeal to the Supreme Court of the State of Washington by RCW 2.06.030, but where RCW 2.06.030 authorizes an arbitrary and unreasonable classification of cases published by the court of appeals based upon a vague and indefinite standard of "precedential value".

In the instant case, it could well be said that "precedential value" existed in that the case involved the

absence of court approval on a commissioner's deed which approval was mandatorily required by RCW 6.28.050. Under that statute no right to the property passed to Lettie LaFaun Taylor or respondent, R & A Construction, Inc., and since the deed was of record with the King County Auditor's office, under the existing and well-settled law of the State of Washington, it gave notice to the world and R & A Construction, Inc., of the infirmities in the title. This fact alone under the existing and well-settled law of the State of Washington would have deprived the respondent, R & A Construction, Inc., of the status of a *bona fide* purchaser, thus preventing the respondent from asserting the defense of equitable estoppel against the petitioner, the true owner of the property. However, the decision of the court of appeals had the effect of overruling the previous and well-established law of the State of Washington in a very important area involving a substantial issue, and yet the decision was not published under the authority of RCW 2.06.040 as not having precedential value. The publication of the opinion would have constituted a major departure from the established rule and precedent in Washington. By not publishing the opinion, and by not giving it any precedential value, the court of appeals was virtually at liberty to decide the case in any manner it chose. This, petitioners contend deprives the petitioners and those similarly situated from the protection afforded by appeal to the supreme court and by the publication of all opinions of the supreme court as required in Article 4, § 21, of the Washington State Constitution, since each published opinion of that court must be deemed to have "precedential value" and the dictates of the common law and the principle of *stare decisis* must needs serve to curb any abuses which might otherwise occur in the rendering of decisions not subject to public scrutiny and which are

removed from the body of the state law and *stare decisis* as having no "precedential value" and being uncitable in future litigation — legal pariahs or untouchables no less.

WHEREFORE, petitioners respectfully request a hearing in this court.

C. E. HORMEL
Counsel for Petitioners
225 Basin Street S.W.
Eprhata, Washington 98823
Tel: (509) 754-4801

APPENDIX

IN THE SUPERIOR COURT
OF
THE STATE OF WASHINGTON
FOR KING COUNTY

R & A CONSTRUCTION, INC., A WASHINGTON CORPORATION,
Plaintiff

vs.

CAL G. TAYLOR AND THELMA H. TAYLOR, HIS WIFE; PHILLIP TAYLOR; DELORIS RAY; DONALD C. TAYLOR; LETTIE LaFAUN TAYLOR AND LaDON'S PARKETTES COOPERATION,
Defendants.

No. 732644

JUDGMENT

THIS MATTER having come on regularly for trial to the court sitting without a jury the 17th, 18th, and 19th days of May, 1972, and the parties being represented by counsel as follows: The plaintiff, R & A Construction, Inc., a Washington corporation, by Paul D. Carey; the defendants, Cal G. Taylor and Thelma H. Taylor, his wife, Phillip H. Taylor, Deloris Ray, Donald C. Taylor and LaDon's Parkettes Cooperation, by C. E. Hormel; and the defendant, Lettie LaFaun Taylor, by Donald L. Thoreson; and the court having considered the various stipulations appearing in the record and the testimony and evidence submitted, and having heard argument of counsel and having considered the written briefs submitted by counsel, and having heretofore made and entered herein its Findings of Fact and Conclusions of Law, it is by the court hereby

ORDERED, ADJUDGED AND DECREED that all legal and equitable title in and to the following described rel property, to-wit:

> South half of the North half of the Northeast quarter of the Southeast quarter of Section 12, Township 23 North, Range 5 East, W.M., in King County, Washington, EXCEPT that portion conveyed to King County for road purposes by deed recorded October 31, 1963 under Auditor's File No. 5659123 and 5659124.

be and the same is hereby quieted in the plaintiff, R & A Construction, Inc., its vendees, successors and assigns; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant LaDon's Parkettes Cooperation is hereby awarded judgment on its counterclaim against the defendant LaFaun Taylor in the amount of $13,500.00 together with its taxable costs; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff R & A Construction, Inc. shall be and is hereby awarded judgment for its taxable costs herein against defendant LaDon's Parkettes Cooperation; and it is further

ORDERED, ADJUDGED AND DECREED that in recognition of the fact that the two primary issues raised in the pleadings of the parties were segregated for trial by the court pursuant to the express stipulation and agreement of counsel in open court and of record, the matter having been heard on the quiet title issue only and the Findings of Fact and Conclusions of Law entered herein being entirely dispositive of

said quiet title issue, it is expressly ordered that no failure to present testimony or other competent evidence during said trial and no omission of specific findings of fact or conclusions of law regarding plaintiff's well and timely pleaded alternative counterclaim for betterments under RCW Chapter 7.28 et seq. shall be deemed a waiver or abandonment by plaintiff of its rights under said chapter, nor shall any said omission be deemed to in any manner foreclose plaintiff's rights under said chapter, and plaintiff's access to the protection afforded under said RCW Chapter 7.28 et seq. is hereby expressly reserved to plaintiff.

DONE IN OPEN COURT This 29th day of January, 1973.

s/ THEODORE S. TURNER
Judge

Presented by:
SKEEL, McKELVY, HENKE, EVESON & BETTS
By Paul T. Carey
Of Attorneys for Plaintiff
R & A Construction, Inc.

THEODORE S. TURNER
Judge of the Superior Court
Seattle, Washington 98104

January 30, 1973

Mr. Paul D. Carey
1020 Norton Building
Seattle, Washington 98104

Mr. C. E. Hormel
225 Basin Street Southwest
Ephrata, Washington 98823

Mr. Donald L. Thoreson
610 4th & Pike Building
Seattle, Washington 98101

Gentlemen:

Re: R & A Construction, Inc. v. Taylor
King County Cause No. 732644

On January 29 I signed and filed the judgment in the above case with the following changes in the form proposed by Mr. Carey.

On page 2, line 10, after the figure $13,500.00, I inserted the following: "together with its taxable costs". On the same page, in line 13, after the word "against" I struck the word "all". In the next following word "defendants" I struck the "s" and inserted "La Don's Parkettes Cooperation".

Prior to signing the judgment I had considered Mr. Hormel's motion for reconsideration or in the alternative for a new trial, and concluded that I would deny

it. I have not drafted a formal order to embody that ruling.

I noted also Mr. Hormel's letter of January 18, in which he referred to his proposed order of dismissal of the individual defendants "with the exception of Lettie LaFaun Taylor." It is my view that the language in Mr. Carey's proposed form of judgment contained on page 2, lines 7 to 13, inclusive, as corrected by the interlineations which I have above recited, will take care of the matter.

If a separate order of denial of the motion for a new trial is desired, I would be glad to make it on presentation.

Respectfully yours,

Theodore S. Turner

IN THE COURT OF APPEALS
OF
THE STATE OF WASHINGTON

R & A CONSTRUCTION, INC., A WASHINGTON CORPORATION, *Respondent*, v. CAL G. TAYLOR AND THELMA H. TAYLOR, HIS WIFE, PHILLIP H. TAYLOR; DELORIS RAY; DONALD C. TAYLOR, *Appellants*, LETTIE LAFAUN TAYLOR, *Defendant*, AND LADON'S PARKETTES CORPORATION, *Appellant*.	No. 2148-I Division One Filed Jan. 13, 1975

CALLOW, J.—This is a quiet title action brought by the plaintiff, R & A Construction, Inc., against a number of claimants to an interest in certain property. The trial court entered judgment for the plaintiff, and all of the defendants except one appeal. The findings of fact are supported by the record an dset forth a complex factual pattern which we will summarize in narrative form.

In April 1958, Donald C. Taylor and Lettie LaFaun Taylor, then husband and wife, entered into a real estate contract with one G. H. Swanson for the purchase of approximately 10 acres of unimproved land near Renton, Washington, hereinafter referred to as the "whole property." By warranty deed dated May 22, 1958, G. H. Swanson conveyed to Donald and Lettie Taylor a portion of the whole property, hereinafter referred to as the "homesite." The property in dispute in

this action is the whole property less the homesite parcel, hereinafter referred to as the "subject property."

In June 1958, Donald and Lettie Taylor purchased from a concern called Kerr Homes, two 16 year old frame structures which were moved onto a common foundation situated on the homesite. To finance the purchase of these structures, Donald and Lettie Taylor, by warranty deed dated June 10, 1958, conveyed the land constituting the homesite to Claren Kerr and Gladys Kerr, his wife, and concurrently entered into a contract with Kerr Homes to repurchase the land and the two frame structures on installment payments. By a quit claim deed dated July 24, 1958, Claren and Gladys Kerr then conveyed the land constituting the homesite to one Jerrold C. Kerr.

By March 1963, Donald and Lettie Taylor were some twenty payments delinquent on the Kerr (homesite) contract and were at least twelve payments delinquent on the Swanson (subject property) real estate contract. Faced with losing the whole property as a result of these delinquencies, Donald Taylor approached his father, Caldwell G. Taylor, for sufficient money to reinstate the Kerr and Swanson contracts. Caldwell Taylor thereafter advanced the necessary funds to his son on the express condition that Donald and Lettie Taylor join with other members of the Taylor family, form a cooperative association, and deed the subject property to the cooperative. Donald Taylor agreed to his father's condition, and Caldwell Taylor thereafter provided his son with sufficient funds to pay off the then outstanding balances on both the Kerr (homesite) and Swanson (subject property) contracts. In addition to Donald Taylor's promise to form a cooperative association to hold the subject property, Caldwell Taylor de-

manded and received as a further condition of his loan to Donald and Lettie Taylor a mortgage upon the whole property.

Articles of incorporation for the cooperative association to be called LaDon's Parkettes were filed with the Secretary of State on October 13, 1964. Donald Taylor was designated as President and Trustee, Lettie Taylor as Secretary-Treasurer and Trustee, Thelma Taylor as Vice President and Trustee, Deloris Ray as Trustee, and Phillip Taylor as Trustee. On the same day, Donald and Lettie Taylor conveyed the subject property to LaDon's Park ttes for love and affection. During the existence of the corporation since October 1964, there has not been a corporate bank account created, only one annual meeting has been held, no annual reports have been filed with the Secretary of State, shares of stock have not been issued, no formal minute book has been maintained, and the corporation's sole source of funds has been Caldwell Taylor. The only activity of the corporation has been the preparation of a preliminary plat of the whole property and contracting for the clearing of a portion of said property. Caldwell Taylor paid all of the cost of this activity.

From June 1964 to January 1967, Donald and Lettie Taylor made irregular monthly payments to Caldwell Taylor to reimburse him for the money loaned to pay off the Kerr and Swanson real estate contracts and, in part, to repay numerous personal loans made to Donald and Lettie Taylor for living expenses. In January 1967, Lettie Taylor sued Donald Taylor for divorce. Donald and Lettie Taylor had fallen behind in their payments to Caldwell Taylor; and as a result, Caldwell and Thelma Taylor filed two lawsuits on April 10, 1967, one to foreclose the mortgage upon the whole property and the other to recover on five separate

causes of action for money loaned to Donald and Lettie Taylor. Caldwell and Thelma Taylor caused the whole property to be subjected to a writ of attachment issued in the suit to recover monies loaned.

A decree of divorce between Donald and Lettie Taylor was entered on April 27, 1967, awarding her the entire interest in (1) the homesite and (2) all the interest of the parties consisting of shares of stock in LaDon's Parkettes and any interest the corporation may have in the subject real property. On March 8, 1968, Lettie Taylor commenced an action against the cooperative association, LaDon's Parkettes, alleging a lack of consideration for the October 13, 1964 conveyance of the subject property to LaDon's Parkettes by Donald Taylor and herself. She also filed in this action an affidavit disavowing knowledge of the whereabouts of the other officers and trustees of the corporation, which affidavit was knowingly false and fraudulent. This affidavit was fair on its face, and its falsity did not appear in the court file. Based upon this false affidavit which purported to show that the defendants had been duly and regularly served with notice and summons, the court authorized substitute service of process by publication in the action. Upon the defendants' failure to appear in the action, judgment was entered therein on May 15, 1968, which ordered in part that the quit claim deed from Donald and Lettie Taylor to LaDon's Parkettes, dated October 9, 1964, be declared null and void and which appointed a court commissioner for the purpose of conveying to Lettie Taylor, as her separate property, the subject real property. Pursuant to the May 15, 1968, judgment in Lettie Taylor's action to set aside the conveyance of the subject property to the cooperative asociation, the court commissioner executed a commissioner's deed to the subject property dated May 24, 1968. This deed contained a correct legal de-

scription of the subject property and conformed to the requirements of the Hay 15, 1968, judgment but did not contain an endorsement of approval by the court as required by statute. It was delivered to Lettie Taylor and duly recorded on May 24, 1968.

After arms length negotiations during which the plaintiff R & A Construction, Inc., inspected and agreed to purchase the whole property, R & A Construction required the seller to furnish a title report. The title report disclosed no infirmities and in particular failed to disclose the lack of court approval on the commissioner's deed. It purported to show record title to the whole property vested in Lettie Taylor in fee simple. Lettie Taylor conveyed the whole property to R & A Construction by warranty deed dated June 18, 1968, for $23,500 in cash. To clear the record of all known encumbrances against the whole property, R & A Construction caused $10,000 of the purchase price to be paid directly to the attorneys for Caldwell and Thelma Taylor in full satisfaction of all obligations giving rise to the mortgage foreclosure action they had commenced and to satisfy the action in which the whole property had been subject to attachment. On July 2, 1968, R & A Construction recorded its warranty deed to the whole property. On the same day a satisfaction of judgment was filed in the mortgage foreclosure action instituted by Caldwell and Thelma Taylor, and the lawsuit in which they had caused the whole property to be attached was treminated by the filing of an order of dismissal, with prejudice.

Following its purchase of the whole property in good faith reliance that it was the sole owner in fee simple of the whole property, R & A Construction commenced a program of development of the property for residential use, which included causing all necessary

engineering, surveying, and other work to be done according to all applicable platting and subdivision ordinances, regulations and statutes. The whole property was formally dedicated and platted into an addition known as May Valley Highlands; and on October 8, 1968, this plat was recorded by R & A Construction. In continued reliance that it was the sole owner in fee simple of the whole property, R & A Construction installed asphalt streets and concrete curbs, storm sewers, water lines and underground electronic and telephone utilities at a cost in excess of $100,000 as of late November or early December 1968. By December 1968, R & A Construction had graded the whole property, cleared it of all standing timber, and had roughed in roads and water lines throughout the whole property. Donald Taylor personally visited the property in the winter of 1968 and witnessed some of the work being done by R & A Construction. Caldwell and Thelma Taylor also visited the land constituting the whole property in November and December 1968 and witnessed the improvements being made by R & A Construction at that time. In addition o personally observing the early stages of the construction work being done, Donald Taylor, Caldwell Taylor and Thelma Taylor personally searched the records of the King County Auditor in November 1968 and actually located in the records (1) the commisioner's deed to Lettie Taylor dated May 24, 1968, and (2) the warranty deed dated June 18, 1968, whereby Lettie Taylor had conveyed the whole property to R & A Construction.

Thereafter, Donald Taylor, Caldwell Taylor and Thelma Taylor engaged attorneys and on December 2, 1968, on behalf of the corporation, LaDon's Parkettes, filed a motion to vacate the original May 15, 1968, judgment entered in the Lettie Taylor versus LaDon's Park-

ettes lawsuit. No notice whatsoever was given to R & A Construction that such action was being taken. On January 28, 1969, the judgment of May 15, 1968, was set aside; and on March 4, 1970, a judgment was entered dismissing the complaint originally filed by Lettie Taylor against the corporation, LaDon's Parkettes. R & A Construction was not at any time made a party to the action by Lettie Taylor against LaDon's Parkettes or subsequent matters in that cause and first became aware of an attack upon the original judgment entered in that action by virtue of a letter from Lettie Taylor's attorney dated December 12, 1969. When R & A Construction received this letter, it had, in addition to placing upon the whole property the general improvements described, also innocently and in good faith caused individual dwellings to be constructed on each of the 33 separate lots in May Valley Highlands at a total cost to R & A construction of over $400,000.

From November 1968 to December 12, 1969, Donald Taylor had visited the whole property on numerous occasions and during that period had moved to a house within 10 blocks of the property. He also had observed the development project being carried on upon the property by the plaintiff During the same period. Caldwell and Thelma Taylor also visited the property on several occasions and saw the improvements being constructed. Throughout this period, the status of the property was a constant source of discussion among the Taylor family. However at no time did any of them notify the plaintiff of any alleged infirmity in the plaintiff's title to the whole property, and at no time was it disclosed to the court in the Lettie Taylor versus LaDon's Parkette's action that R & A Construction had in reliance upon Lettie Taylor's clear record title in June 1968 purchased the whole property. Further, the

courtwas not advised that during the period from June 1968 through December 1969 that R & A Construction had openly, visibly and with no effort whatsoever at concealment, constructed in and upon the whole property a residential subdivision complete with telephone utilities, water lines, storm sewers and 33 houses. R & A Construction has since sold and conveyed to innocent third parties all 33 lots in the May Valley Highlands subdivision, warranting its title to the land and improvements thereon to each of the purchasers. This narrative sets forth the facts as found by the trial court.

The trial court held that the defendants were estopped. It was held that the court record in the case of Lettie Taylor versus LaDon's Parkettes reflected strict compliance with RCW 4.28.090, substantial compliance with RCW 4.28.050 and was in all respects fair on its face. The court concluded that by their silence and, by their failure to take prompt action to protect their title at a time when relief could have been granted without injustice to the plaintiff and those claiming under it, the claims of the defendants were barred. Judgment was entered quiteing title in the plaintiff and awarding costs. The defendants challenge the findings and conclusions of the trial court asserting that the plaintiff should be held to have been on notice of the defects in the file of the action wherein Lettie Taylor had fraudulently achieved the record title which she conveyed to the plaintiff The defendants further claim that the plaintiff was not a bona fide purchaser and, therefore, not entiled to the imposition of the equitable relief of laches and estoppel imposed by the trial court against them.

The appropriate disposition of this action is best undertaken by initially discussing the last issue presented, that of laches and estoppel. Quiet title actions

are properly maintainable by persons claiming equitable title to realty:

> Jurisdiction to grant relief by a decree quieting a claimant's title to land is inherent in a court which exercises equity powers. 44 Am. Jur. *Quieting Title* § 3 (1942) This state is aligned with those jurisdictions which permit one who has only an equitable title to land to maintain an action to quiet title, even though out of possession. *Brodsky v. Nelson*, 57 Wash. 671, 107 Pac. 840 (1910); *Carlson v. Curren*, 48 Wash. 249, 93 Pac. 315 (1908); *Brown v. Baldwin*, 46 Wash. 106, 89 Pac. 483 (1907); RCW 7.28.010. The superior title whether legal or equitable must prevail. *Rue v. Oregon & Washington R.R.*, 109 Wash. 436, 186, Pac. 1074 (1920; RCW 7.28.120.

Finch v. Matthews, 74 Wn.2d 161, 166, 443 P.2d 833 (1968). *See also Strand v. State*, 16 Wn.2d 107, 132 P.2d 1011 (1943). The plaintiff took possession of the subject property under color of title from its grantor, Lettie Taylor, was unaware of any defects in its title and in good faith constructed substantial improvements on the property. These facts are sufficient to establish an equitable interest in the realty thereby allowing an action to quiet title.

The burden of proving estoppel is on the party asserting it, *Bonanza Real Estate, Inc. v. Crouch*, 10 Wn. App. 380, 517 P.2d 1371 (1974), and the doctrine should not be extended lightly to divest persons of their legal interests in land. *King County v. Boeing Company*, 62 Wn.2d 545, 384 P.2d 122 (1963). When legal title to property is at stake, the party asserting estoppel must establish it by clear, convincing and cogent evidence. *Finley v. Finley*, 43 Wn.2d 755, 264 P.2d 246, 42

A.L.R.2d 1379 (1953); *Thomas v. Harlan*, 27 Wn.2d 512, 178 P.2d 965, 170 A.L.R. 1138 (1947); *Tryce v. Gosa*, 11 Wn.2d 572, 119 P.2d 926 (1941); *Burkey v. Baker*, 6 Wn. App. 243, 492 P.2d 563 (1971); Annot., 4 A.L.R.3d 361 (1965). Estoppel is generally a question of fact to be decided under the facts of the particular case. *People ex rel. Dept. of Public Works v. Ryan Outdoor Advertising, Inc.*, 39 Cal. App. 3d 804, 114 Cal. Rptr. 499 (1974); *Forrest v. Forrest*, 9 Ill. App. 3d 111, 291 N.E. 2d 880 (1973); *Travelers Indem. Co. v. Nationwide Constr. Corp.*, 244 Md. 401, 224 A.2d 285 (1966); *Turcotte v. Trevino*, 499 S.W.2d 705 (Tex. Civ. App. 1973); 31 C.J.S. *Estoppel* § 163 (1964). The elements of equitable estoppel have been consistently stated to be:

> The requisites of an equitable estoppel are: (1) an admission, statement, or act, inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party arising from permitting the first party to contradict or repudiate such admission, statement, or act.

Shafer v. State, 83 Wn.2d 618, 623, 521 P.2d 736 (1974). *See also Malacky v. Scheppler*, 69 Wn.2d 422, 419 P.2d 147 (1966). The party claiming estoppel must show lack of knowledge or means of acquiring knowledge as to the facts in question. *Consolidated Freight Lines v. Groenen*, 10 Wn.2d 672, 117 P.2d 966, 137 A.L.R. 1072 (1941); *J & J Electric, Inc. v. Gilbert H. Moen Co.*, 9 Wn. App. 954, 516 P.2d 217 (1973); *In re Kitsap-Mason Dairymen's Ass'n*, 6 Wn. App. 926, 497 P.2d 604 (1972). Estoppel can arise from silence, acquiescence or inaction where there is a duty to speak:

"If one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to have remained silent." *Harms v. O'Connell Lumber Co.*, 181 Wash. 696, 700, 44 P.2d 785 (1935). *Huff v. Northern Pac. Ry.*, 38 Wn.2d 103, 228 P.2d 121 (1951); *Consolidated Freight Lines, Inc. v. Groeven, supra; De Boe v. Prentice Packing & Storage Co.*, 172 Wash. 514, 20 P.2d 1107 (1933).

Although principles of estoppel are not applied without compelling reasons to bar persons from asserting interests in real property, nonetheless:

> It is a widely accepted rule that one who stands by and sees another purchase land or enter upon it under a claim of right and permits such other to make expenditures or improvements under circumstances which would call for notice or protest cannot afterward assert his own title or interest against such person. As some of the authorities broadly state the principle, one who knowingly and silently permits another to expend money on land under a belief that he has the right or title will not be permitted to set up his own right, to the exclusion of the rights of the one who has made such improvements or expended such money.

(Footnotes omitted.) 28 Am. Jur. 2d *Estoppel & Waiver* § 112 (1966). *See* 31 C.J.S. *Estoppel* §§ 94, 150 (1964); *Guthrey v. Garis*, 245 Ark. 477, 432 S.W.2d 868 (1968); *Jurek v. Smuczynski*, 6 Ill. App. 2d 426, 209 N.E.2d 850 (1965); *Thaxton v. Beard*, 201 S.E.2d 298 (W.V. App. 1973). In 2 J. Pommeroy, Equity Jurisprudence § 818 (5th ed. 1941), the rule is stated:

> Acquiescence consisting of mere silence may also operate as a true estoppel in

> equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. The reqlisites of such estoppel have been described. A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle: If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent. A most important application includes all cases where an owner of property, A, stands by and knowingly permits another person, B, to deal with the property as though it were his, or as though he were rightfully dealing with it, without interposing any objection, as by expending money upon it, making improvements, erecting buildings, and the like.

This rule is quoted with approval in *Nugget Properties, Inc. v. County of Kittitas*, 71 Wn.2d 760, 767, 431 P.2d 580 (1967). *See also Harms v O'Connell Lumber Co., supra.* The facts as found by the trial judge establish that the defendants were aware in November 1968 that the plaintiffs were claiming title to the property and making substantial improvements to it. The defendants were then under a duty to immediately indicate their interests in the realty to the plaintiff. One claiming legal ownership of property cannot stand by and knowingly permit another person to deal with the property as though it were his own without interposing an objection. *See Nugget Properties, Inc. v. County of Kittitas, supra.*

In addition to the silence, inaction and acquiescence by the defendants which indicates laches on their part and estops them from claiming an interest in the property, the evidence is clear that at the time the plain-

tiff purchased the property from its grantor $10,000 of the purchase price of $23,500 was paid to Caldwell and Thelma Taylor in satisfaction of their claims under a mortgage foreclosure action. This action on their part is inconsistent with their present claim of title. It indicates not only notice to them of the claim of the plaintiff but also acceptance on their part of satisfaction of their claims and relinquishment of their interest in the property as against the plaintiff. The conclusion of the trial court that the defendants are estopped is reinforced by such circumstances. *Shafer v. Shafer, supra.*

Our decision in this matter that the defendants' failure to assert an interest in the property when they knew that the plaintiff held the subject property under color of title and was proceeding with substantial improvements bars the defendants' claim as the lapse of time under such circumstances amounts to laches on their part. Here, not only a substantial amount of time was allowed to pass but the change of position on the part of the defendants was great and the cost of the improvements paid for by the plaintiff was great. The doctrines of laches and estoppel bar the claims of the defendants. *McKnight v. Basilides*, 19 Wn.2d 391, 143 P.2d 307 (1943); *Meyer v. Trantum*, 135 Wash. 449, 237 P. 106 (1915); *Samuel & Jessie Kenney Presbyterian Home v. Kenney*, 45 Wash. 106, 88 P. 108 (1906). Our decision on this issue makes a discussion of the other isues raised by the defendants unnecessary.

The judgment of the trial court is affirmed. Pursuant to RCW 2.06.040, this opinion will not be published.

s/ CALLOW, J.

WE CONCUR:

s/ SWANSON, C. J.

s/ WILLIAMS, J.

IN THE COURT OF APPEALS
OF
THE STATE OF WASHINGTON

R & A CONSTRUCTION, INC., A WASHINGTON CORPORATION, *Respondent* v. CAL G. TAYLOR AND THELMA H. TAYLOR, HIS WIFE, PHILLIP H. TAYLOR, DELORIS RAY, DONALD C. TAYLOR AND LADON'S PARKETTES CORPORATION, *Appellants*, LETTIE LAFAUN TAYLOR, *Defendant.*	No. 2148-I ORDER DENYING PETITION FOR REHEARING

The appellants, Cal G. Taylor and Thelma H. Taylor, his wife, Phillip H. Taylor, Deloris Ray, Donald C. Taylor and LaDon's Parkettes Corporation, having filed their petition for rehearing and the court having considered the petition and respondent's answer thereto, and the court having determined that the petition should be denied; Now, therefore, it is hereby

ORDERED that the petition be, and the same hereby is, denied.

Done this 14th day of May, 1975.

By the Court:

s/ WARD WILLIAMS, *Chief Judge*

IN THE SUPREME COURT
OF
THE STATE OF WASHINGTON

R & A CONSTRUCTION, INC., *Respondent*, *vs.* CAL G. TAYLOR ET AL, *Petitioners*.	No. 43773 (2148-I) ORDER DENYING PETITION FOR REVIEW

The Court having considered the petition for review of the decision of the Court of Appeals in this cause, together with the answer thereto,

It is ordered that the petition be and it is hereby denied.

Dated this 24th day of June, 1975.

By the Court:

s/ CHARLES F. STAFFORD, *Chief Justice*

IN THE COURT OF APPEALS
OF
THE STATE OF WASHINGTON

R & A CONSTRUCTION, INC., A WASHINGTON CORPORATION, *Respondent,* v. CAL G. TAYLOR AND THELMA H. TAYLOR, HIS WIFE; PHILLIP H. TAYLOR, DELORIS RAY, DONALD C. TAYLOR, *Appellants,* LETTIE LAFAUN TAYLOR, *Defendant.* AND LA DON'S PARKETTES CORPORATION, *Appellant.*	REMITTITUR No. 2148-I King County No. 732644

The State of Washington to:

The Superior Court of the State of Washington
in and for King County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on January 13, 1975, became the final judgment of this court in the above entitled case on July 31, 1975. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows: One Thousand Two Hundred Forty-one and 29/100 Dollars ($1,241.29) in favor of Respondent and against Appellants and their surety, United Pacific Insurance Company, not to exceed the amount of the bond.

The petition for rehearing was denied by an order dated May 14, 1975; the petition for review was denied by an order dated June 24, 1975.

cc: Mr. C. E. Hormel
Mr. Donald Thoreson
Clerk of the Supreme Court
Reporter of Decisions
Skeel, McKelvy, Henke, Evenson & Betts
Mr. Paul D. Carey

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 31st day of July, 1975.

RICHARD D. TAYLOR
Clerk of the Court of Appeals, State of Washington, Division I.

No. 75-637

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

CAL G. TAYLOR and THELMA H. TAYLOR, his wife; PHILLIP TAYLOR: DELORIS RAY: DONALD C. TAYLOR and LADON'S PARKETTES CORPORATION,
Petitioners,

v.

R. & A. CONSTRUCTION, INC.,
Respondent, and

LETTIE LAFAUN TAYLOR,
Respondent.

BRIEF OF RESPONDENT R & A CONSTRUCTION, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondent R & A Construction, Inc. submits (1) that Petitioners raise no substantial federal question, (2) that even if it be assumed, arguendo, that a substantial federal question has now been raised, Petitioners failed to timely and with fair precision raise that question for consideration by either the Court of Appeals of the State of Washington or the Supreme Court of the State of Washington, and (3) that regardless of the foregoing, the state court decision now sought to be reviewed rests firmly upon state grounds wholly independent of the "federal question" now

raised. Under the circumstances, this Court lacks jurisdiction to grant review by certiorari in this cause.

Although the record presented in the Petition for Writ of Certiorari (the Petition) manifests glaring omissions in terms of a failure to show that the "federal question" now urged was timely raised and preserved in the state court proceedings, it is not necessary for the purposes of this brief to supplement the Statement of the Case nor the Appendix incorporated in the Petition.

PETITIONERS RAISE NO SUBSTANTIAL FEDERAL QUESTION

Without specifying the precise basis therefor, Petitioners state that

> "The jurisdiction of this Court to entertain the Petition for Certiorari is based upon Title 28, USC, §1257."

That statement is immediately followed by an argument that

> (1) RCW 2.06 et seq., State of Washington legislation implementing Amendment 50 to the Constitution of the State of Washington (designated Article IV, §30 thereof) constitues an invalid exercise of power by the state legislature because the statute purports to repose "exclusive appellate jurisdiction" in a newly constituted intermediate Court of Appeals, whereas Article IV, §4 of the Constitution of the State of Washington grants that appellate jurisdiction to the State Supreme Court, and
>
> (2) That as a consequence of the refusal of the Supreme Court of the State of Washington to review the decision of Division I of the Court of Appeals of the State of Washington, Petitioners were denied due process of law and equal protection of the laws under both the State and Federal Constitutions.

The argument is presumably addressed to that portion of Title 28, §1257 granting this Court jurisdiction on a petition for writ of certiorari

> ". . . where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States . . ."

At the heart of this argument is the assumption, wholly unsupported by decisional law of the courts of the State of Washington, that RCW 2.06 et seq. is in fact repugnant to Article IV, §4 of the Constitution of the State of Washington. As this Court has frequently held, the construction of state laws is the exclusive responsibility of state courts. *Speiser v. Randall*, 78 S.Ct. 1332, 357 US 513, 2 L.Ed.2d 1460, and

> "We are asked to go into the proper construction of the state statute and its validity under the state constitution. But these are questions of local law, the decision of which by the supreme court of the state is controlling." *First National Bank of Garnett v. Ayers*, 16 S.Ct. 412, 160 US 660, 664, 40 L.Ed. 573.

and

> "The question whether or not a state statute conflicts with the constitution of the state is settled by the decision of its highest court." *Carstairs v. Cochran*, 24 S.Ct. 318, 193 US 10, 16, 48 L.Ed. 596.

Moreover, where state courts have not passed on a question involving construction of a state statute, the Supreme Court of the United States should not adopt a construction which might render the statute of doubtful validity, but will await determination on the issue by state courts. *Stevenson v. Binford*, 53 S.Ct. 181, 287 US 251, 77 L.Ed. 268.

Assuming arguendo, however, that the purely state law

question presented here might warrant review by this Court in light of the due process and equal protection implications Petitioners advance, a number of critical questions remain unanswered, i.e., was the "federal question" raised before the state courts and if so, at what stage, in what manner, and in what fashion did the state court pass upon the question? These questions lead directly to the second stage of this analysis, for in point of fact the "federal question" now urged by Petitioners was never raised before nor passed upon by the courts of the State of Washington in the instant case.

PETITIONERS' FAILURE TO TIMELY RAISE AND PRESERVE THE "FEDERAL QUESTION"

Petitioners now challenge jurisdiction of the Court of Appeals of the State of Washington to review the trial court decision of the Superior Court of King County, and demand a full review of the trial court decision by the Supreme Court of the State of Washington. The Rules of the Supreme Court of the United States, and in particular Rule 23(f) thereof, expressly dictate that when review of a state court judgment is sought the petition for certiorari must specify, *inter alia*,

> (1) The stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised,
>
> (2) The method of raising [the federal questions sought to be reviewed], and
>
> (3) The way in which [the federal questions sought to be reviewed] were passed upon by the [lower] court.

Rule 23(f) of the Rules of the Supreme Court of the

United States further require that the foregoing matters be set forth in such form

> ". . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Compliance with the above quoted portions of Rule 23(f) is clearly jurisdictional, for as stated in *Wilson v. Cook*, 327 US 474, 90 L.Ed. 793, 799, in construing §237 of the Judicial Code [Now 28 USC §1257].

> "We are without jurisdiction of the appeal in No. 328, unless there was 'drawn in question' before the Supreme Court of Arkansas 'the validity of a statute' of the state, 'on the ground of its being repugnant to the constitution . . . or laws of the United States.' The purpose of this requirement is to restrict our mandatory jurisdiction on appeal (citations omitted) and to make certain that no judgment of the state court will be reviewed on appeal by this court *unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds*, (citations omitted) or, when the statute, as applied, is so assailed, *until it has opportunity authoritatively to construe it*. (Citations omitted) This *jurisdictional requirement* is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state (citations omitted) or has in fact been decided by it (citations omitted) and that its decision was necessary to the judgment. The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground." (Emphasis added)
>
> * * *
>
> "As the record does not show that the plaintiffs presented for decision to the state supreme court any federal question, they have no appeal to this court un-

> less the opinion of the state supreme court shows that the court ruled on the validity of a state statute under the laws and Constitution of the United States. (Citations omitted)."

The *Wilson* court further noted that

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. (Citations omitted)" (90 L.Ed. 793, 801).

As this court will recognize, the instant Petition for Writ of Certiorari makes no showing whatsoever that the "federal question" now urged was at any stage presented to or considered by either the Court of Appeals of the State of Washington or the Supreme Court of the State of Washington in determining this cause. At no time did Petitioners challenge the jurisdiction of the Court of Appeals of the State of Washington to hear and determine this matter on appeal from the trial court, and at no time did Petitioners demand review by the State Supreme Court on the theory now urged relating to Petitioners' construction of the Constitution of the State of Washington. The "federal question" Petitioners advance is in fact now urged for the first time

before any court in the instant Petition for Writ of Certiorari.

THE TRUE GROUND OF DECISION

Not having been called upon to even consider the "federal question" now urged by Petitioners, it is not the least bit surprising to find that the state court judgment (and subsequent Court of Appeals decision) here involved rests quite firmly in a determination of state law questions. The Court of Appeals Memorandum Decision which the Supreme Court of the State of Washington declined to review makes no reference whatsoever to the involvement of a "federal question", much less any reference to resolution of a "federal question" as being necessary to determination of the cause. On the contrary, the Court of Appeals Memorandum Decision unequivocally states that

> "The appropriate disposition of this action is best undertaken by initially discussing the last issue presented, that of laches and estoppel." (Petition for Certiorari, p. 35)

and

> "Our decision on this issue makes a discussion of the other issues raised by defendants unnecessary." (Petition for Certiorari, p. 40)

The "other issues raised by defendants" (Petitioners here) are recited in the Court of Appeals Memorandum Decision (Petition for Certiorari, p. 35) and included allegedly defective service of process, alleged record notice of alleged title defects, alleged fraud of Respondent's predecessor in interest, and Respondent's alleged lack of status as a bona fide purchaser. Clearly none of those issues involved federal questions contemplated by either 28 USC. §1257 or Rule 23(f) of the Rules of the Supreme Court of the United States.

Even if it might somehow be argued that a federal question was properly raised below and preserved on appeal in the state court proceedings, a matter the Petition here manifestly fails to show, the cause was nonetheless clearly decided on adequate and independent state grounds. As noted in *Durley v. Mayo*, 351 US 277, 100 L.Ed. 1178, 1183

> "It is a well established principle of this court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision fo the federal question was necessary to its determination of the cause. (Citations omitted)"

The proposition thus stated is discussed at length in numerous decisions compiled in an annotation found at 84 L.Ed. 926, an annotation updated in 100 L.Ed. 1200, it being unequivocally stated in the latter that

> "Thus the more recent decisions provide ample support for the proposition that review by the Supreme Court of a state court decision requires that it be shown (1) that the state court actually decided a federal question, and (2) that decision of the federal question was necessary to the state court's determination of the cause (there being no adequate state ground upon which the state court's judgment could have rested)."

The state court decision sought to be reviewed here clearly rests solely upon state law grounds. The record before this Court affirmatively shows that the "federal question" now urged was not even presented for consideration by the state courts. It necessarily follows that decision of a federal question was not necessary to the state court's determination of the cause.

CONCLUSION

In summary, Respondent submits that Petitioners do not in fact pose a substantial federal question for review, and that even if the contrary be assumed, arguendo, the "federal question" now raised was neither presented to nor considered by the appellate courts of the State of Washington. In the final analysis the decision sought to be reviewed was determined solely upon state law grounds and in no fashion turned upon a determination of a "federal question". For the various reasons set forth herein, Respondent R & A Consruction, Inc. respectfully submits that this Court lacks jurisdiction to review the state court decision here involved and should forthwith deny this Petition for a Writ of Certiorari.

Respectfully submitted,

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